Hainal-Konyi (M) Sdn Bhd v Luxor Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–621 OF 1996
KAMALANATHAN RATNAM J
27 APRIL 2000

Contract *— Termination — Unilateral termination — Agreement to engage consultant engineers for construction works — Whether resignation of plaintiff's engineers amounted to breach of consultancy contract — Whether termination was unlawful*

The defendant engaged the plaintiff as its consultant civil and structural engineers by way of a letter of offer dated 14 December 1995. On 17 April 1996, the plaintiff's engineer (DW2) tendered his resignation giving a three-month notice to the plaintiff. On 7 May 1996, the defendant unilaterally terminated the contract without the plaintiff's agreement and stated that it wished to change consultants and required the plaintiff to submit an invoice for all their work done thus far. The plaintiff had carried out its duties and there were never any complaints about the plaintiff's performance of its duties right up to the date of termination of the contract by the defendant. The plaintiff contended that the termination by the defendant of the contract was unlawful and therefore the plaintiff was entitled to claim the full contract sum. The defendant contended that it terminated the contract because of the fact that once DW2 had tendered his resignation as of 17 April 1996 and since the other engineer, Azman, had already earlier left the plaintiff, the plaintiff had committed a breach of the agreement by no longer having the expertise of registered engineers to carry out the works on the project and in failing to appoint any other registered engineers after the resignation of DW2 and Azman. The defendant also submitted that since no where had the plaintiff used the words 'unlawful termination' either in any letter or in the pleadings, the plaintiff could not rely on this issue.

Held, allowing the plaintiff's claim:

(1) The defendant's contention that the plaintiff had no qualified engineers to take over the works under the contract was totally unfounded, misconceived and without basis. On the contrary, there was evidence that the plaintiff was at all times ready and prepared to proceed with the works and had hired another qualified engineer. The court was satisfied that the defendant's termination of the contract was indeed unlawful and the court found that at the time of the termination, the plaintiff was never in breach of its obligation (see pp 484G, 485B).

(2) The court was satisfied that by the pleadings, the defendant ought to have known that the plaintiff was relying on unlawful termination. The pleading was sufficient to inform the defendant that the termination was unilateral and unlawful since it was without the plaintiff's agreement (see p 485H).

(3) There is no legal obligation placed upon an innocent party to a contract to make any declaration to the party who had wrongfully terminated the contract to state that the termination was wrongful (see p 486B).

(4) By virtue of s 74(1) of the Contracts Act 1950, the plaintiff was entitled to be placed in the position it would have been in, had the contract not been unlawfully terminated (see p 486G).

[Bahasa Malaysia summary

Defendan telah mengambil plaintif bekerja sebagai jurutera perunding sivil dan pembinaan melalui sepucuk surat tawaran bertarikh 14 Disember 1995. Pada 17 April 1996, jurutera plaintif (DW2) telah meletak jawatan dengan memberikan notis tiga bulan kepada plaintif. Pada 7 Mei 1996, defendan telah menamatkan kontrak tersebut tanpa persetujuan plaintif dan menyatakan bahawa ia ingin menukar perunding dan menghendaki plaintif menyerah invois untuk semua kerja yang dilaksanakan setakat ini. Plaintif telah melaksanakan tugasnya dan tiada sebarang aduan telah dibuat mengenai pelaksanaan tugas plaintif sehingga tarikh penamatan kontrak oleh defendan. Plaintif berhujah bahawa penamatan kontrak oleh defendan adalah tak sah dan dengan itu plaintif berhak menuntut jumlah kontrak yang penuh. Defendan berhujah bahawa ia telah menamatkan kontrak tersebut disebabkan hakikat bahawa sebaik sahaja DW2 telah menawarkan perletakan jawatannya pada 17 April 1996 dan memandangkan seorang jurutera yang lain bernama Azman telah meninggalkan plaintif, plaintif telah memungkiri perjanjian tersebut dengan tidak lagi memiliki kepakaran jurutera berdaftar untuk melaksanakan kerja-kerja ke atas projek dan dalam kegagalan untuk melantik mana-mana jurutera berdaftar lain selepas perletakan jawatan DW2 dan Azman. Defendan juga berhujah bahawa oleh kerana plaintif tidak menggunakan kata-kata 'penamatan yang tidak sah' sama ada dalam mana-mana surat atau dalam pliding, plaintif tidak boleh bergantung pada isu ini.

Diputuskan, membenarkan tuntutan plaintif:

(1) Hujah defendan bahawa plaintif tidak mempunyai jurutera yang berkelayakan untuk mengambil alih kerja-kerja di bawah kontrak tersebut tidak beralasan, salah dan tanpa asas pada keseluruhannya. Sebaliknya, terdapat keterangan bahawa pada semua masa material plaintif rela dan bersedia untuk meneruskan kerja-kerja dan telah menggaji seorang jurutera lain yang berkelayakan. Mahkamah berpuas hati bahawa penamatan kontrak tersebut oleh defendan sememangnya tidak sah dan mahkamah mendapati bahawa pada masa penamatan, plaintif tidak memungkiri kewajipannya (lihat ms 484G, 485B).

(2) Mahkamah berpuas hati bahawa melalui pliding, defendan seharusnya telah menyedari bahawa plaintif bergantung pada

penamatan yang tidak sah. Pliding tersebut adalah memadai untuk memaklumkan kepada defendan bahawa penamatan tersebut adalah secara satu pihak dan tidak sah oleh kerana ia adalah tanpa persetujuan plaintif (lihat ms 485H). A

(3) Tiada kewajipan moral diletakkan pada mana-mana pihak kepada suatu kontrak yang tidak bersalah untuk membuat apa-apa perisytiharan kepada pihak yang dengan salahnya menamatkan kontrak untuk menyatakan bahawa penamatan tersebut adalah salah (lihat ms 486B). B

(4) Disebabkan s 74(1) Akta Kontrak 1950, plaintif berhak diletakkan dalam kedudukan yang sepatutnya andainya kontrak tersebut tidak ditamatkan secara tidak sah (lihat ms 486G).] C

Notes

For cases on termination of agreement, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2999–3008.

D

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd & Anor [1999] 2 MLJ 625 (refd)

Legislation referred to E

Contracts Act 1950 s 74(1)
Registration of Engineers Act 1967

Ong Chee Kwan (*LH Saw* with him) (*Saw & Co*) for the plaintiff.

S Selvarajah (*S Seenivasagam* with him) (*Azariah & Associates*) for the defendant. F

Kamalanathan Ratnam J:

Facts

The defendant engaged the plaintiff as its consultant civil and structural engineers for its Damansara Fairway Project ('the project') consisting of three tower blocks to be built on a piece of land held under Lot 23785 Mukim of Sungai Buloh, Selangor, by way of a letter of offer dated 14 December 1995 ('the contract'). G

According to cll 2.1 and 2.2 of the contract, the fee agreed upon was a lump sum payment of RM410,000 consisting of RM242,000 for an alternative structural design and a sum of RM168,000 for the scope of services as civil and structural consultancy works under Part A of the Condition of Engagement set out by the Board of Engineers Malaysia ('BEM'). H

On 7 May 1996, the defendant unilaterally terminated the contract without the plaintiff's agreement and stated that it wished to change consultants and required the plaintiff to submit an invoice for all their work I

done thus far. The plaintiff had carried out its duties and there were never any complaints about the plaintiff's performance of its duties right up to the date of termination of the contract by the defendant on 7 May 1996. Up to the date of termination, the defendant had only paid the plaintiff a sum of RM36,750 which comprised a fee of RM35,000 plus the 5% service tax. On 17 April 1996, the plaintiff's engineer, one Lim Joo Kiat ('Lim'), who was assigned to work for the project tendered his resignation giving a three-month notice to the plaintiff. This meant that his employment with the plaintiff would expire on 16 July 1996. The defendant proceeded to engage a new firm of consultant civil and structural engineers called Azman, Lim & Associates (formerly known as Jurutera Perunding ANZ Sdn Bhd) ('the new firm') on or about 17 June 1996 and the said Lim and one Azman bin Ahmad ('Azman') are the only directors and substantial shareholders of the said new firm. Both Lim and Azman were prior to their resignation from the plaintiff, directors of the plaintiff as well.

The plaintiff sent the final invoice dated 15 August 1996 to the defendant for the balance of the contracted sum of RM393,750 after deducting the previous payment of RM36,750. Upon receipt of the final invoice, the defendant replied by a letter dated 9 September 1996 refusing to pay the entire balance contract sum and required the plaintiff to justify its claim.

The claim

It is the plaintiff's contention that the termination by the defendant of the contract on 7 May 1996 is unlawful and that therefore, the plaintiff is entitled to claim the full contract sum. Although not specifically pleaded in the statement of claim the plaintiff prays in the alternative for the sum of RM242,000 for the alternative structural design works and RM127,000 for the consultancy works on a quantum meruit basis. There is also the usual prayer for interest and costs.

Findings of the court

Was the termination unlawful?

The defendant argues that it terminated the agreement because of the fact that once Lim ('DW2') had tendered his resignation as of 17 April 1996, and since the other engineer, Azman, had already earlier left the plaintiff, the plaintiff had committed a breach of the agreement by no longer having the expertise of registered engineers to carry out the works on the said project and in failing to appoint any other registered engineers after the resignation of DW2 and Azman. This is a very surprising stand taken by the defendant. After all, the said Lim was still contractually in service when the defendant unilaterally terminated the contract. Lim would have to work up till 16 July 1996. The defendant jumped the gun and no doubt with a reason. The said Lim had now teamed up with the new firm and the defendant had engaged this new firm in which Lim and Azman are the only two directors. In any case in its letter of termination of the contract dated

7 May 1996 the defendant never mentioned the true reason pleaded in evidence. The reason given in the letter was that the defendant intended to change the consulting engineers. It never contended that the plaintiff lacked local experts.

Paragraph 3 of the defence and counterclaim states that the defendant used the services of the plaintiff on the basis that the engineers employed by the plaintiff were engineers registered with the BEM, as provided for under the Registration of Engineers Act 1967. Quite apart from DW2, at the time of the defendant's termination of the contract there were other engineers with the plaintiff, namely PW1, PW2, and one Wong Loo Min. PW2 testified that with the departure of DW2, he could have easily taken over the said project since DW2 was just the plaintiff's assigned engineer and that it is quite normal for an engineer to take over when another leaves. PW2's ability was never seriously challenged. In fact Lim was asked specifically in cross-examination (p 85 of notes of evidence):

> Q: Apakah asas menyatakan bahawa Lim Beng Voon (PW2) tidak dapat bertindak sebagai jurutera bertauliah menggantikan anda untuk projek ini?
>
> A: Saya tidak pasti.

To my mind, the fact that PW2 was at the material time assigned to other projects in Johore or in Singapore, is irrelevant. It is also a matter for consideration by this court that DW3 also could not give any reason to show that the plaintiff could not have proceeded with its obligations under the contract after DW2 left the company. All DW3 could say was that he was informed by PW1 that the plaintiff would fly in engineers from Singapore and that he therefore presumed that there was no available engineer in Malaysia with the plaintiff. Further DW1's evidence that the plaintiff had no qualified engineers to proceed with the project cannot be accepted as he had no personal knowledge of this fact which he admitted to during cross-examination. I have also to consider the admission of DW1 that he never discussed with the plaintiff whether the plaintiff could proceed with the works after DW2 had tendered his resignation.

It is my finding therefore that the defendant's contention that the plaintiff had no qualified engineers to take over the works under the contract is totally unfounded, misconceived and without basis. On the contrary, there is evidence that the plaintiff was at all times ready and prepared to proceed with the works and had hired another qualified engineer, Mohd Nazari bin Khalidun, on 27 May 1996. I accept PW1's explanation that he could have taken over the project from DW2. Although PW1 was at the material time a registered engineer, nevertheless his registration (because he is a foreigner) was specifically only for another project, namely, Radiant Vision Sdn Bhd. However, there was nothing to prevent PW1 from applying to be registered as the engineer for this project or he could have obtained the services of any of the registered engineers in the plaintiff to do so. I am in no doubt that the true reason for the defendant terminating the plaintiff was in order to pass on the said works to DW2 who had left the firm. DW3 admitted that he was earlier informed by DW2 that

he, DW2, would be resigning from the plaintiff and that he would be joining the new firm. There is evidence from PW1 that DW2 had in fact taken with him the computer diskettes and hard copies of the plans for the project from the plaintiff when he left the plaintiff.

I am satisfied that the defendant's termination of the contract was indeed unlawful, and I find that at the time of the termination, the plaintiff was never in breach of its obligation. On the contrary, DW1, who was the architect for the project testified under cross-examination that the plaintiff had performed its obligations satisfactorily. There were also up to the date of the termination no complaints in respect of the plaintiff's performance and obligation. DW3 himself testified that prior to the termination there was no disruption or delay in the plaintiff's services.

In fact, there is no express terms in the contract that the plaintiff must have at all times engineers who are registered with BEM. The defendant never challenged PW1's evidence that he was the senior engineer with the plaintiff and that DW2 was working under him. The fact that PW1 was overseeing the entire project relating to the plaintiff's obligations under the contract was never challenged. Further, the defendant has not pleaded that there was an implied term in the contract that the plaintiff must have a registered engineer to perform the obligations of the plaintiff under the contract. PW1 has given evidence which I accept (in the absence of any rebuttal evidence), that the BEM in fact do not prohibit unregistered engineers from carrying out work so long as they do not endorse the submission of drawings to the local authorities.

DW3 testified that he had proposed to PW1 that DW2 ought to continue as the consultant engineer of the project under contract through the plaintiff. Since DW3 was leaving for overseas and since PW1 had not responded, the defendant contended it was compelled to engage the new firm with Lim and Azman at the helm. It is obvious that the plaintiff was given little or no choice. Either the plaintiff had to engage DW2 on a contract basis or the deal would go to the new firm of which DW2 was one of the two major shareholders. It was no doubt a case of 'heads I win, tail you lose' situation.

The defendant also submitted that since no where had the plaintiff used the words 'unlawful termination' either in any letter or in the pleadings, the plaintiff now cannot rely on this issue. Examining the statement of claim, I note that the plaintiff has pleaded in para 6 of the statement of claim as follows:

> On or about 7 May 1996, the defendant unilaterally terminated the said agreement without the plaintiff's agreement.

I am satisfied that by these pleadings, the defendant ought to have known that the plaintiff was relying on unlawful termination. This to my mind is sufficient to inform the defendant that the termination was unilateral and unlawful since it was without the plaintiff's agreement.

The defendant also argued that by its conduct the plaintiff had accepted the letter of termination dated 7 May 1996. The conduct referred to by the

defendant is the non response by the plaintiff to the letter of termination. That is not correct. Whilst I agree that there was no immediate response from the plaintiff, the plaintiff had in fact by way of its letter dated 15 August 1996 accepted the letter of termination and forwarded an invoice for the sum of RM393,750. No doubt the defendant rejected this and wanted to pay the plaintiff on a quantum meruit basis. But this the plaintiff had rejected by its letter dated 4 September 1996 and insisted on the full settlement. In any case it is my judgment that there is no legal obligation placed upon an innocent party to a contract to make any declaration to the party who had wrongfully terminated the contract to state that the termination was wrongful.

Finally, the contention of the defence that PW1 is not a credible witness is unacceptable. I find that he had given his evidence with utmost candour. The attack on his evidence that by describing himself as a technical director, the witness was not telling the truth, is unfortunate because even DW2, the defendant's main witness was appointed as a technical director of the plaintiff. If the defendant's intention was to disprove PW1's evidence then surely it would have been open to the defendant to have subpoenaed a representative from the BEM to give evidence to contradict PW1. This was not done. I therefore reject any suggestion that PW1 is not a witness of truth.

Damages

Since the said termination is unlawful the plaintiff has been prevented from completing the job under the contract. Section 74(1) of the Contracts Act 1950 specifically provides that when a contract has been broken, the party who suffers by the breach is entitled to receive from the party who has caused the breach, compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. This embodies the principle of restitutio in integrum. I applied this same principle in the case of *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd & Anor* [1999] 2 MLJ 625. Similarly in the case before me the plaintiff is entitled to be placed in the position it would have been in, had the contract not been unlawfully terminated. In other words, it would have been entitled to receive the balance sum of RM393,750 (RM410,000 + RM20,500 (service tax) less RM36,750 already paid). I therefore enter judgment for the plaintiff for:

(a) the sum of RM393,750;

(b) interest at the rate of 4% pa from date of termination of the contract, that is, 7 May 1996 to date of judgment; and

(c) costs.

Plaintiff's claim allowed.

Reported by Jafisah Jaafar